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No. ———

Supreme Court, U.S.
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IN THE
# Supreme Court of the United States
OCTOBER TERM, 1988

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LOCALS 17, 135, 257 AND 608 OF THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO,
*Petitioners*

v.

PEOPLE OF THE STATE OF NEW YORK,
*Respondent*

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## PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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## QUESTIONS PRESENTED

1. Whether, in a case involving broad subpoenas demanding specific information on each of 10,000 union members, the New York state courts erred in not placing on the government the burden of satisfying this Court's exacting three-part standard (compelling interest, substantial relation and minimum necessary intrusion) for justifying infringements of citizens' First Amendment rights.

2. Whether the New York state courts erred in upholding subpoenas which (a) inevitably chilled the rights of association and expression of 10,000 union members, (b) demanded personal information (social security numbers) that did not bear a substantial relation to the government's compelling interest, and (c) were far more invasive in scope and depth than available alternatives that also would have accomplished the government's legitimate investigative objectives.

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PEOPLE OF THE STATE OF NEW YORK,
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## PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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Petitioners, Locals 17, 135, 257 and 608 of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the New York Court of Appeals rendered in the above-entitled proceeding on July 6, 1988.

### OPINIONS BELOW

The opinion of the New York Court of Appeals is not yet published. It is reproduced in Appendix A, *infra.*

The judgment and order of the Appellate Division of the Supreme Court of the State of New York were issued, without opinion, on May 21, 1987. The order is reproduced in Appendix B, *infra.*

The judgment and order of the Supreme Court of the State of New York were issued, without opinion, on April 6, 1987. The order is reproduced in Appendix C, *infra.*

## JURISDICTION

The judgment of the New York Court of Appeals was rendered with an opinion on July 6, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

## CONSTITUTIONAL PROVISIONS

This case involves the First and Fourteenth Amendments of the United States Constitution.

## STATEMENT OF THE CASE

Petitioners are four union locals of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO, known as Locals 17, 135, 257 and 608 (hereinafter referred to as "Carpenter Locals"). On February 17, 1987, the District Attorney for New York County served petitioners with four subpoenas *duces tecum.*[1] The subpoenas demanded the names, addresses, home telephone and social security numbers of each member of the Carpenter Locals. This demand required petitioners to produce the information with respect to some 10,000 union members.

On March 2, 1987, petitioners brought a motion in the Supreme Court of the State of New York to quash the subpoenas. Petitioners objected to the subpoenas on the grounds that, *inter alia,* they cast an impermissible chill on petitioners' First Amendment right of association.[2] Petitioners further argued that some of the information

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[1] These subpoenas were issued pursuant to a New York County Grand Jury investigation of alleged corruption in the carpentry and drywall industry.

[2] The Fourteenth Amendment imposes on state governments the same prohibitions imposed on Congress by the First Amendment. *Edwards v. South Carolina,* 372 U.S. 229, 235 (1963). Petitioners also challenged the subpoenas as overbroad and unreasonable in violation of the Fourth Amendment.

demanded in the subpoenas (notably social security numbers) bore no substantial relation to the grand jury investigation and that the scope of the subpoenas (covering 10,000 union members) was far broader than necessary to achieve the government's objectives.

On April 2, 1987, New York Supreme Court Justice George F. Roberts convened a hearing *in camera* to consider petitioners' motion to quash. Justice Roberts excluded petitioners from this hearing while allowing two Assistant District Attorneys to participate. After a short conference (approximately ten to fifteen minutes) with the two Assistant District Attorneys, Justice Roberts denied petitioners' motion to quash, refusing to entertain oral argument.[3]

The record below contains no evidence that Justice Roberts properly considered petitioners' First Amendment rights or sought to balance the extent of the First Amendment intrusions against the legitimate interests of the government in obtaining information concerning union membership. In fact, Judge Vito Titone of the New York Court of Appeals, who had access to the *in camera* record on appeal, stated:

> [T]here was absolutely no showing that the First Amendment implications were even considered and it appears that no balancing at all was done before or after the subpoenas were issued.

Appendix A at 18a.

Despite the fact that the hearing was held *in camera*, material presented to the court found its way into a major New York City newspaper. This leak and others

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[3] On April 6, 1987, Justice Roberts issued an order, without opinion, requiring petitioners to comply with the four subpoenas. Justice Roberts also ordered that the membership lists remain under the direction and control of Robert Mass, Assistant District Attorney for New York County, and that the lists not be duplicated. Appendix C.

relating to the initial grand jury investigation have never been adequately explained.

Petitioners appealed Justice Roberts' order and moved to stay the order pending appeal. The Appellate Division of the Supreme Court of the State of New York denied the motion to stay on April 16, 1987,[4] and subsequently affirmed, without opinion, the order compelling disclosure. On June 18, 1987, petitioners appealed to the New York Court of Appeals.

On July 6, 1988, the New York Court of Appeals issued a ruling affirming the Appellate Division's decision. By a vote of four to three, the Court of Appeals held that petitioners' constitutional rights were not unjustifiably infringed. The majority opinion, written by Judge Richard Simons, placed the burden on petitioners to prove that the government's actions cast an impermissible chill on their First Amendment rights. The majority also found that the subpoenas were substantially related to the investigation. Judge Simons concluded that petitioners failed to demonstrate sufficient chill to overcome the government's compelling interest in combatting crime.

Three judges dissented from the Court of Appeals' holding. Writing for the dissent, Judge Titone pointed out that the majority's decision directly contradicted well-settled principles of federal constitutional law. Specifically, Judge Titone stated that once First Amendment

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[4] *See* Appendix E. The New York Court of Appeals also denied petitioners' motion to stay. *See* Appendix D. Petitioners complied with Justice Roberts' order, turning over the membership lists to the government. This act of compliance does not render the case moot because the District Attorney is still holding and using the membership lists in his ongoing investigation. In addition, the membership lists can be used in subsequent and even unrelated investigations. *See, e.g., United States v. Friedman,* 532 F.2d 928, 931 (3d Cir. 1976) (compliance with summonses for records did not render case moot because of possible use of these records in subsequent criminal or civil proceedings).

rights were implicated, "governing federal precedents required that the burden shift to the government" [5] to justify its impairment of the union members' right of association.

The dissent also objected to the majority's failure to require the government to employ the least drastic means available to achieve its specific investigative objectives. The dissent pointed out that the District Attorney admitted he did not need the vast majority of the information covered by the subpoenas: [6] the primary focus of the investigation was only one of the four Carpenter Locals, although it did involve a few officials from a second local. Given the limited focus of this investigation, the dissent found that the government had not justified issuing such far-reaching subpoenas, nor had the government justified rejecting less restrictive alternatives.[7]

## REASONS FOR GRANTING THE WRIT

A writ of certiorari should be granted in this case because the New York Court of Appeals' decision misconstrues settled principles of First Amendment law, and because it constitutes an unprecedented and unwarranted expansion of prosecutorial power.

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[5] Appendix A at 15a.

[6] Although the government's objective in issuing the subpoenas was to identify potential grand jury witnesses, the government also demanded union members' social security numbers. The District Attorney stated he was seeking social security numbers for the purpose of reviewing potential criminal records of persons covered by the subpoenas. *See* Excerpts from Government's Brief to the Appellate Division of the Supreme Court of the State of New York, Appendix F.

[7] Various narrowly tailored alternatives were suggested to the government. One possibility was to submit the membership lists to a third party, such as a retired judge or a law school dean. Another alternative was to limit disclosure to a percentage of the union members. The government rejected, and the majority on appeal did not consider, these alternatives. *See* Titone, J., dissenting, Appendix A at 19a.

When government investigative actions infringe upon First Amendment rights, this Court requires the government to meet an exacting three-part test: the investigation must be in furtherance of a compelling government interest; the information demanded must have a substantial relation to that compelling interest; and the least intrusive means capable of achieving the government's legitimate purpose must be employed. This three-part test must be satisfied whenever First Amendment rights are likely to be chilled, irrespective of the nature of the activity being investigated by the government.

In connection with an investigation into alleged industry corruption, the government demanded personal information, including social security numbers, on each of 10,000 union members, nearly all of whom had no relation to the government's investigation other than the fact that they were associated in the Carpenter Locals. Despite its admission that most of the subpoenaed information was unnecessary to its investigation, the government refused to tailor the subpoenas or narrow their scope so as to minimize the chilling effect on petitioners' First Amendment rights. In upholding these far-reaching subpoenas, the Court of Appeals failed to apply the exacting standard set down by this Court for justifying First Amendment intrusions.

The Court of Appeals' decision is likely to have a substantial adverse impact on the rights of association and expression of members of unions and other comparable organizations throughout the United States. If allowed to stand, this case will authorize uncurtailed governmental investigations of groups and associations under the banner of combatting crime. The starting point for future industrial investigations will be to subpoena the membership lists of unions, trade associations, and other organizations related to the industry under investigation. Complete membership rosters will be demanded, even if few individuals are involved. This Court has never tolerated sweeping investigative measures that so needlessly

impair fundamental constitutional rights. Accordingly, this Court should review and reverse the New York Court of Appeals' decision.

## I. THE NEW YORK COURT OF APPEALS ERRED IN FAILING TO REQUIRE THE GOVERNMENT TO MEET THE EXACTING STANDARD ESTABLISHED BY THIS COURT REGARDING GOVERNMENT ACTIVITY THAT ADVERSELY AFFECTS CITIZENS' FIRST AMENDMENT RIGHTS

### A. Union Members' Freedom Of Association And Expression May Not Be Curtailed Unless The Government Meets The Exacting Burden Of Justification Set Down By This Court For Infringements of First Amendment Rights

Although this Court has never held the rights embodied in or derived from the First Amendment to be absolute, it has consistently recognized these rights to be fundamental and thus deserving of maximum protection. *Gibson v. Florida Legis. Investigation Comm.*, 372 U.S. 539, 544 (1963); *Thomas v. Collins*, 323 U.S. 516, 530 (1945). Among the preferred rights so protected is the freedom of individual citizens to associate. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958). *See also Kusper v. Pontikes*, 414 U.S. 51, 56-57 (1973); *Gibson v. Florida Legis. Investigation Comm.*, 372 U.S. at 544.

The right of association has consistently been interpreted to include the right to enjoy membership in a union and to engage in the full breadth of union expressive activities.[8] In *Thomas v. Collins*, 323 U.S. 516, this Court ruled that

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[8] The government conceded this point:

> No one familiar with the history of the labor movement in this country would deny that the First Amendment right of association must extend to labor unions.

Excerpts from Government's Brief to the New York Court of Appeals, Appendix G.

> [T]he right either of workingmen or of unions . . . to assemble and discuss their own affairs is as fully protected by the Constitution as the right of businessmen, farmers, educators, political party members or others to assemble and discuss their affairs and to enlist the support of others.

*Id.* at 539. Every circuit court of appeals to address this issue has recognized individuals' constitutional rights to organize, join, enlarge the membership of, and further the activities and interests of unions.[9]

Governmental action "'which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.'" *Buckley v. Valeo*, 424 U.S. 1, 25 (1976) (quoting *NAACP v. Alabama ex rel. Patterson*, 357 U.S. at 460-61). *Accord Federal Election Comm'n v. National Right to Work Comm.*, 459 U.S. 197, 207 (1982). Encroachments on this fundamental right which result from compelled disclosure during government investigations cannot be justified by a mere showing of some legitimate governmental interest.[10] *Buckley v.*

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[9] *See Howard Gault Co. v. Texas Rural Legal Aid, Inc.*, 848 F.2d 544, 567 (5th Cir. 1988); *Henderson v. Huecker*, 744 F.2d 640, 645 (8th Cir. 1984); *Brown v. Alexander*, 718 F.2d 1417, 1422 (6th Cir. 1983); *Florida AFL-CIO v. State of Florida Dept. of Labor & Employment Sec.*, 676 F.2d 513, 516 (11th Cir. 1982); *International Org. of Masters v. NLRB*, 575 F.2d 896, 905 (D.C. Cir. 1978); *Connecticut State Fed'n of Teachers v. Board of Educ. Members*, 538 F.2d 471, 478 (2d Cir. 1976); *Lontine v. VanCleave*, 483 F.2d 966, 967 (10th Cir. 1973); *United States v. International Longshoremen's Ass'n*, 460 F.2d 497, 501 (4th Cir.), *cert. denied*, 409 U.S. 1007 (1972); *McLaughlin v. Tilendis*, 398 F.2d 287, 289 (7th Cir. 1968).

[10] *Buckley* involved legislative actions affecting First Amendment rights; however, the burden imposed on the government to justify legislative limitations of the right of association is equally applicable to court orders enforcing disclosure of membership lists. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. at 463 ("It is not of moment that the state has here acted solely through its judicial branch, for whether legislative or judicial, it is still

*Valeo*, 424 U.S. at 64. Rather, the government must meet an exacting standard comprised of three separate elements developed by this Court:

1. The "subordinating interest of the State must be compelling." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. at 463 (citations omitted).

2. "[T]here [must] be a 'relevant correlation' or 'substantial relation' between the governmental interest and the information required to be disclosed." *Buckley v. Valeo*, 424 U.S. at 64 (citations omitted).

3. "[T]he infringement of protected First Amendment rights must be no broader than necessary to achieve a permissible governmental purpose . . .." *Branzburg v. Hayes*, 408 U.S. 665, 699 (1972). *Accord In re Primus*, 436 U.S. 412, 432 (1978); *Buckley v. Valeo*, 424 U.S. at 68; *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288, 307-08 (1964); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960).

The government must satisfy each of these requirements whenever it encroaches on the right to join, participate freely in, or further the interests of unions. That right does not rest solely on the decisions of this Court recognizing that association for economic purposes deserves full First Amendment protection.[11] Association in

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the application of state power which we are asked to scrutinize"). *Accord Pollard v. Roberts*, 283 F. Supp. 248 (E.D. Ark.), *aff'd*, 393 U.S. 14 (1968) (*per curiam*).

[11] *See Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984) ("[I]mplicit in the right to engage in activities protected by the First Amendment [is the] corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends."); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. at 460 ("[I]t is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters . . .").

unions also warrants full First Amendment protection because that participation involves expressive as well as economic interests:

> Although the primary goals of American trade unions are economic rather than political or ideological, American unions have always sought to further their goals in part by appeals to public opinion. To join a union is to join an association engaged in the dissemination of ideas and opinions that may be controversial.

*Hudson v. Chicago Teachers Union Local No. 1*, 743 F.2d 1187, 1193 (7th Cir. 1984), *aff'd*, 475 U.S. 292 (1986). Unions disseminate ideas and seek to influence public and legislative opinion through a variety of means, including public programs, advertising and public relations, charitable endeavors, lobbying and other political activities. *See generally Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977); *Vicksburg Firefighters Ass'n, Local 1688 v. City of Vicksburg*, 761 F.2d 1036 (5th Cir. 1985); *American Fed'n of Labor & Congress of Indus. Orgs. v. Federal Election Comm'n*, 628 F.2d 97 (D.C. Cir.), *cert. denied*, 449 U.S. 982 (1980).

The majority of the New York Court of Appeals failed to require the government to meet this Court's exacting standard, apparently because the underlying investigation was not directed at union expressive activity. The Court of Appeals distinguished *Local 1814, Int'l Longshoremen's Ass'n v. Waterfront Comm'n of New York Harbor*, 667 F.2d 267 (2d Cir. 1981), on the grounds that the Waterfront Commission was investigating a union's political action committee.[12] However, the First Amendment damage caused by the government's broad

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[12] *See* Appendix A at 5a-6a.

subpoenas is their *probable inhibiting effect* on union members' exercise of their *associative and expressive rights*—the same interest the *Waterfront* court found worthy of First Amendment maximum protection.

If citizens' rights are to be properly protected, this Court's exacting standard must be applied whenever government investigations adversely affect First Amendment interests. The focus of the government's underlying investigation in a given case should not determine the standard for justifying First Amendment intrusions.

### B. The Excessive Scope And Depth Of The Government's Subpoenas Inevitably Cast A Chill On Union Members' Rights Of Association And Expression

In the case at bar, the government's broad subpoenas cast a chill on petitioners' First Amendment rights. This chill was inevitable given the breadth and depth of the four subpoenas: [13] the government demanded information on each of 10,000 union members, when by its own admission it was investigating only a limited number of union officials.[14] The specific information demanded went beyond names and addresses, to include home telephone and social security numbers. The District Attorney made the startling admission that he wanted social security numbers for the purpose of conducting a general explora-

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[13] In fact, some courts have found that the mere conduct of a governmental investigation casts an inevitable chill on the right of association regardless of the breadth or depth of the investigation. *See, e.g., Australia/Eastern U.S.A. Shipping Conference v. United States*, 537 F. Supp. 807 (D.D.C. 1982). In *Australia/Eastern*, the court held that "the overwhelming weight of authority is to the effect that forced disclosure of first amendment activities creates a *chilling effect* which must be *balanced* against the interests in obtaining the information." *Id.* at 810 (emphasis added).

[14] Appendix A at 12a.

tion of individual criminal records.[15] The daily press promptly obtained information about the government's subpoenas and reported it.[16] Given the scope of the subpoenas, this publicity was predictable.

The New York Court of Appeals found "petitioners have not demonstrated that organizational activity would be curtailed because of the delivery of the lists." Appendix A at 7a. The Court of Appeals erred in requiring petitioners to prove the existence of an actual chill. The party whose First Amendment rights have been infringed need only show a "reasonable probability" that its First Amendment rights will be implicated.[17] More-

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[15] *See* Excerpts from Government's Brief to the Appellate Division of the Supreme Court of the State of New York, Appendix F. Social security numbers also allow the government to gain access to statistical information relating to citizens' financial records; in fact, petitioners expressed concern to Justice Roberts below that the District Attorney would use the social security numbers for random screening of union members' personal financial records. *See* note 19, *infra*.

[16] *See* Appendix H. This news leak has resulted in the publication of certain material submitted to the court during proceedings from which the petitioners were excluded. To date, the government has failed to disclose the leaked materials to petitioners, despite petitioners' specific request for the material.

[17] *Buckley v. Valeo*, 424 U.S. at 74; *In re Grand Jury Proceedings*, 776 F.2d 1099, 1103 (2d Cir. 1985); *ETSI Pipeline Project v. Arkansas Power & Light Co.*, 674 F. Supp. 1491 (D.D.C. 1987); *St. German of Alaska Eastern Orthodox Catholic Church v. United States*, 653 F. Supp. 1342, 1347 (S.D.N.Y. 1987), *aff'd*, 840 F.2d 1087 (2d Cir. 1988); *Australia/Eastern U.S.A. Shipping Conference v. United States*, 537 F. Supp. at 812. The *Buckley* court recognized that "unduly strict requirements of proof [on parties asserting First Amendment intrusions] could impose a heavy burden." *Id.* at 74. Therefore, the Court held that parties need show "only a *reasonable probability*" of First Amendment impairment. *Id.* (emphasis added). Some courts have misinterpreted *Buckley* to require proof of actual adverse impact on First Amendment rights. *See, e.g., O'Neal v. United States*, 601 F. Supp. 874, 879-80 (N.D. Ind. 1985); *United States v. Manufacturers Bank of Southfield*, 518 F. Supp. 495, 498 (E.D. Mich. 1981).

over, at the time of issuance, it is difficult if not impossible to demonstrate the psychological impact that a subpoena will actually have upon the individual members of any organization. This Court should recognize that prospective members are likely to be deterred from joining a union, and existing members will be reluctant to participate in the full range of expressive union activities, when they know that the criminal records and financial history of all union members are subject to ongoing government scrutiny.

The inevitable chilling effect of broad subpoenas aimed at uncovering the identity of union members was recognized by the Second Circuit Court of Appeals in *Waterfront*, 667 F.2d 267. Though the subpoena in *Waterfront* was directed only at those union members who had contributed to a political action committee, the court found a substantial danger that longshoremen would perceive a connection between full exercise of a union's expressive activities (e.g., contributions to a political action committee) and being subjected to government investigations. Thus, the court affirmed the trial court's decision to limit the scope of the subpoena to ten percent of the names originally sought. *Waterfront*, 667 F.2d at 274. Under the same analysis, the subpoenas issued in this case are likely to cause union members "to refrain from fully exercising their right to engage in the full range of Union activities, which include political as well as economic and social activities." *See* Titone, J., dissenting, Appendix A at 13a.

### C. The Court Of Appeals Erred In Failing To Require The Government To Minimize The Intrusive Impact Of Its Legitimate Investigative Demands

Despite the clear chill cast on petitioners' First Amendment expressive rights, the New York Court of Appeals failed to require the government to meet the exacting burden of the three-part standard set down by this Court.

Instead, the Court of Appeals permitted the government to enforce broad subpoenas based solely on a showing of its compelling interest in combatting crime and a marginal relation between that interest and the information demanded. This holding directly conflicts with numerous decisions of this Court requiring the government not only to justify its infringement of First Amendment rights, but also to minimize that infringement. *Buckley v. Valeo*, 424 U.S. at 25; *Branzburg v. Hayes*, 408 U.S. at 699; *NAACP v. Alabama ex rel. Flowers*, 377 U.S. at 307-08; *Shelton v. Tucker*, 364 U.S. at 488.

The decision of the New York Court of Appeals creates a dangerous precedent of federal constitutional law which, if followed, will erode established rights of association and expression. By requiring the party opposing the intrusion to prove actual chill, the Court of Appeals' decision eliminates the government's traditional duty to justify and limit infringements of fundamental constitutional rights. This unprecedented reading of the Constitution invites widespread abuse of prosecutorial power.

## II. THE COURT OF APPEALS ERRED IN PERMITTING OVERLY BROAD SUBPOENAS TO STAND DESPITE THEIR UNWARRANTED INFRINGEMENT OF PETITIONERS' FIRST AMENDMENT RIGHTS

Not only did the Court of Appeals err in failing to place the correct burden of justification on the government; in addition, the court erred by upholding subpoenas that fail to meet the second and third elements of this Court's test.[18] Had the Court of Appeals applied the appropriate test, it would have found that the scope and depth of the government's subpoenas (a) did not bear a substantial relation to its interest in combatting crime,

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[18] With respect to the first element, there is no dispute that the government has a compelling interest in investigating crime.

and (b) were not narrowly tailored to accomplish the government's purposes.

### A. Subpoenaing Social Security Numbers Of Ten Thousand Union Members Bore No Substantial Relation To The Government's Interest In Identifying Grand Jury Witnesses

The New York Court of Appeals found that the substantial relation requirement had been met because the subpoenaed information would "enable the Grand Jury to locate and identify union members, the potential witnesses for Grand Jury testimony, without unduly burdening or delaying the search . . .." Appendix A at 4a. While names, telephone numbers and addresses may facilitate locating the relevant union members, social security numbers do not further this endeavor. The justification offered by the government was that social security numbers could be used to check for criminal records of union members. This purpose bore no relation to the focus of the investigation.[19] Moreover, Judge Titone's review of *in camera* material disclosed no evidence that the First Amendment implications of seeking social security numbers were even considered. Appendix A at 18a.

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[19] Even if the request for social security numbers had some marginal relation to the government's investigation, the high value placed on the confidentiality of that information should have led the court to require that it be deleted from the subpoenas. *See, e.g., International Bhd. of Electrical Workers Local Union No. 5 v. HUD*, No. 87-3656, 128 L.R.R.M. (BNA) 3110 (3d Cir. 1988). In *Electrical Workers*, the Third Circuit stressed the strong privacy interest that employees have in their social security numbers. *Id.*, 128 L.R.R.M. (BNA) at 3112. The court prevented the release of non-union workers' social security numbers pursuant to a Freedom of Information Act request. In so doing, the court recognized that "the extensive use of Social Security numbers as universal identifiers in both the public and private sectors is 'one of the most serious manifestations of privacy concerns in the Nation.'" *Id., quoting* S. Rep. No. 1183, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 6916, 6943.

### B. The Court Of Appeals Failed To Limit The Scope Of The Subpoenas So As To Minimize The Adverse Impact On Union Members' First Amendment Rights

Even where courts find subpoenas to be substantially related to the government's compelling interest, this Court's decisions require further inquiry before First Amendment intrusions may be authorized. Under these decisions, the Court of Appeals was obliged to examine the *scope* of the subpoenas to ensure they were drawn as narrowly as possible consistent with the government's objectives. *See, e.g., Shelton v. Tucker*, 364 U.S. at 488. *Accord Branzburg v. Hayes*, 408 U.S. at 699. Where courts find investigative requests affecting First Amendment rights to be overbroad, they invariably scale back the requests or reject them entirely. *See, e.g., Shelton v. Tucker*, 364 U.S. 479; *Pollard v. Roberts*, 283 F. Supp. 248; *Waterfront*, 667 F.2d 267; *Bursey v. United States*, 466 F.2d 1059 (9th Cir. 1972); *United States v. Garde*, 673 F. Supp. 604 (D.D.C. 1987).

In *Waterfront*, 667 F.2d 267, a case with facts closely analogous to the one at bar, the Second Circuit stressed the need to "assess whether the disclosure will impact a group *properly limited in number* in light of the governmental objective to be achieved." *Id.* at 273 (emphasis added). The court noted with approval that the Waterfront Commission had made a substantial effort to narrow the focus of its subpoena to the names of 450 union members. Nevertheless, it affirmed the decision below to limit further the scope of the subpoena to ten percent of the names originally sought. *Id.* at 273-74.

In sharp contrast with the Commission in *Waterfront*, the government made no effort to limit its subpoenas in this case. Though the government admitted the investigation was focused on a few high-ranking officials,[20] it

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[20] *See* Titone, J., dissenting, Appendix A at 12a.

demanded information on more than 10,000 members of four independent locals. Given the narrow focus of its investigation, there is no justification for such sweeping subpoenas.

The government claimed it could not narrow the subpoenas for fear of exposing potential witnesses to possible threats and influence, thereby jeopardizing the investigation. The government never substantiated this argument. No showing was made that petitioners have ever subjected potential grand jury witnesses to threats or undue influence. In fact, the government rejected several alternatives which would have preserved the anonymity of potential witnesses without intruding so deeply upon petitioners' First Amendment rights.[21]

The government's failure to consider and adopt less intrusive approaches reflects a callous disregard for the rights of the union members involved. Had the New York Court of Appeals subjected the government to the exacting scrutiny required under First Amendment law, it would have required the government to pursue its objectives in a more focused and responsible manner.

## CONCLUSION

The influential New York Court of Appeals has established a dangerous precedent with far-reaching consequences. Once a valid purpose of combatting crime is involved, prosecutors will have a powerful tool to conduct sweeping investigations of groups and associations. Even where few individuals are the actual target of the investigation, specific personal information on all members may be obtained and used by the government. The potential for abuse is enormous; the chilling effect on association membership and expressive activity is virtually certain.

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[21] *See* note 7, *supra*.

As information flow has become more pervasive in society and the ability of government to probe into the personal lives of citizens is facilitated by universal identifiers such as social security numbers, the government and the courts should adhere more precisely to this Court's traditional exacting standard for justifying First Amendment intrusions. The New York Court of Appeals has effectively ignored this standard. Both from the standpoint of the legal principles involved and from the standpoint of its probable substantial damage to union membership and expressive activities, the Court of Appeals' decision merits review and reversal by this Court.

Respectfully submitted,

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September 6, 1988

# APPENDICES

## APPENDIX A

STATE OF NEW YORK
COURT OF APPEALS

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1 No. 169

IN THE MATTER OF GRAND JURY SUBPOENAS FOR LOCALS 17, 135, 257 AND 608 OF THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO,
*Appellants,*

THE PEOPLE &C.,
*Respondent.*

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William J. Dealy, NY City, for appellants.

Robert M. Morgenthau, DA, NY County (Robert A. Mass, Mary C. Farrington and Mark Dwyer of counsel) for respondent.

OPINION

SIMONS, J.

A New York County Grand Jury has issued subpoenas duces tecum for the membership lists of four Union Locals of the Limited Brotherhood of Carpenters and Joiners of America, AFL-CIO and they have moved to quash, claiming the subpoenas violated their First and Fourth Amendment rights under the United States Constitution. The courts below denied the motion, and petitioners' subsequent motion for a stay, and they now have surrendered the lists to the District Attorney. We conclude that the District Attorney's continued possession of the membership lists pending the completion of the Grand Jury's investigation does not violate the constitutional rights of the Union Locals or their members and therefore affirm.

The proceeding arises out of an investigation into corruption in the carpentry and drywall industry. It focused primarily on high ranking union officials but the prosecutor informed the court that he assumed that some rank and file members might also become targets. Pursuant to this investigation the New York County District Attorney's office issued subpoenas duces tecum to Locals 17, 135, 257, and 608 of the Carpenters Union, requesting that each produce a list containing the names, addresses, home telephone numbers, and social security numbers of their members. The Locals moved to quash the subpoenas, claiming violations of their First and Fourth Amendment rights. The District Attorney opposed the motion claiming that the First Amendment rights of petitioners' members were not implicated but contending alternatively that even if membership in a union came within the associational rights addressed in the federal cases, that the People had met the compelling State interest test and were entitled to the records. On the basis of these claims, the trial court conducted an *in camera* hearing during which it pressed the District Attorney on the need for the information, particularly the need for the Social Security numbers, and the possibility of limiting the number of names produced. After considering the District Attorney's arguments, the court denied the motion, but limited the subpoena to the extent of requiring that the lists remain under the direction and control of the principal assistant district attorney assigned to the investigation, ordering him not to duplicate them and requiring that he return the lists to the Locals upon completion of the Grand Jury's investigation.

The Appellate Division refused to stay Supreme Court's order and petitioners surrendered the lists to the District Attorney. It subsequently affirmed Special Term's order on the merits and petitioners appeal to this Court on constitutional grounds. We now affirm.

I

Although neither petitioners nor respondent contends that the appeal is moot, mootness is a doctrine related to subject matter jurisdiction and thus must be considered by the Court sua sponte (*see, Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 713-714; *People ex rel. Geer v Common Council of the City of Troy*, 82 NY 575, 576). Ordinarily, if a party has surrendered subpoenaed material, the legal injury has occurred and the courts cannot provide an effective remedy. That being so, the appellate court must dismiss the appeal unless it falls within the well recognized exception where courts may exercise their extraordinary discretion to entertain the appeal notwithstanding mootness (*Matter of Roadway Express v Commissioner of New York State Dept. of Labor*, 66 NY2d 742, 744). This case does not fall within the traditional exception (*see, e.g., Matter of Knight-Ridder Broadcasting v Greenberg*, 70 NY2d 151, 154, n2; *Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715, *supra*; *Matter of Jones v Berman*, 37 NY2d 42, 57). Although the First Amendment question posed is substantial, and novel in this Court, it is not the type which will typically evade review because a stay can be obtained to preserve the issue for appellate review before the material is surrendered.

Nevertheless, an appeal is not rendered moot if there remain undetermined rights or interests which the respective parties are entitled to assert (*Matter of District Attorney of Suffolk County*, 58 NY2d 436, 443; *Gilpin v Mutual Life Ins. Co.*, 299 NY 253, 261-262; *see*, Cohen & Karger, Powers of the New York Court of Appeals, § 98, at 417). In this case, the rights of the parties remain undetermined because the membership lists which, pursuant to Supreme Court's order, cannot be copied, remain under the control of the assistant district attorney and continue to be used by him in the investigation (*cf. Matter of Roadway Express v Commissioner of the New*

*York State Dept. of Labor*, 66 NY2d 742, *supra* [no argument that continued possession of the subpoenaed material constituted a continuing injury]). We, therefore, turn to the merits.

II

The Locals' primary argument is that the continued enforcement of the subpoena will have an inevitable "chilling effect" on the association rights of their members. Specifically, the Locals contend that carpenters in New York City will perceive a connection between being a union member and being called before the Grand Jury and this perception may deter individuals from joining the union or discourage members from attending union meetings or engaging in robust debate with other members.

When a First Amendment claim is presented, the government may not enforce a subpoena of this type unless it is substantially related to a compelling governmental interest (*Brown v Socialist Workers '74 Campaign Committee*, 459 US 87, 91-92; *Buckley v Valeo*, 424 US 1, 64; *see also Communist Party of the United States v Subversive Activities Control Group*, 367 US 1, 92-103). Unquestionably, the State has a compelling interest in preventing and fighting corruption in the construction industry and the establishment of a specialized Grand Jury is a legitimate means of doing so. Although petitioners dispute it, the membership lists have a substantial relation to the investigation because they will enable the Grand Jury to locate and identify union members, the potential witnesses for Grand Jury testimony, without unduly burdening or delaying the search and without having to proceed through the traditional channels of first notifying the union leaders and exposing witnesses to possible intimidation.

The cases petitioners cite in support of their claim are inapposite. In *NAACP v Alabama* (357 US 449), the

State of Alabama sought access to the membership rolls of the NAACP ostensibly to determine whether the Association was conducting an intrastate business in violation of the state foreign corporation registration statute. The court recognized in that case that petitioners had been subjected to prior harassment and reprisal from the government (*id.* at 362-363) and that the State did not actually need the membership lists to determine whether the Association was conducting a business (*id.* at 464-465). In *Pollard v Roberts* (283 F Supp 248 [three judge court], *affd per curiam without opn* 393 US 14), the State of Arkansas sought to obtain a list of the names of all contributors to the Republican party to determine whether votes were being bought. In quashing the subpoena, the court held that the State had made no showing that the identities of Republican party contributors was even "reasonably relevant to defendant's investigation of alleged vote buying" (*id.* at 257). The court also noted that although there had been no showing that any individuals had been subjected to reprisals on account of contributions to the party, "it would be naive not to recognize that the disclosure of identities of contributors * * * would subject at least some of them to potential economic or political reprisals of greater or lesser severity" (*id.* at 258). In this case, however, the Grand Jury has a legitimate and compelling need for the lists to conduct its investigation.

Petitioners also claim the subpoenas are overbroad because, although the primary focus of the Grand Jury's investigation is on the illegal activities of the Union leaders and stewards, the Grand Jury seeks the names, addresses and social security numbers of each member of the four Locals and petitioners. They contend that the reasoning of the court in *Local 1814, International Longshoremen's Assn. v Waterfront Commn. of New York Harbor* (667 F2d 267) requires reversal here.

In *Waterfront* a labor union and its political action committee brought suit to enjoin the Waterfront Com-

mission from enforcing a subpoena issued during an investigation into whether longshoremen were being coerced into authorizing payroll deductions for contributions to a political action committee. The subpoena sought the list of all longshoremen who recently authorized payroll deductions. The District Court enforced the subpoena but only after modifying it to limit disclosure on a random basis to ten percent of the names the Commission sought. The parties cross appealed, and the Court of Appeals for the Second Circuit affirmed, holding that although disclosure of the names of the contributors to the PAC would have a chilling effect on free association rights the Commission had a compelling interest in obtaining them. The court observed that the subpoena bore a substantial relation to effectuating the governmental interest justifying enforcement of the subpoena but stated that the subpoena, as drafted, was too broad. It noted that if the ten percent limitation of the District Court was inadequate for the Commission to meet its goals, it could reapply to the court for further disclosure.

*Waterfront* may be distinguished from this case on several grounds. First, the union in *Waterfront* raised a First Amendment claim because it feared that the disclosure of the names of contributors to political parties or political action committees sought by subpoena would discourage future activity or contributions by its members (*see also, Pollard v Roberts, supra*). Economic activity, such as membership in a union, may also be protected. As the Supreme Court noted in *NAACP v Alabama* (357 US 449, 460-461, *supra*), "it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters . . . state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny".

But the effect subpoenas have on the membership of a union and participation in its activities is quite different

from the effect subpoenas may have on membership in a political group or participation in its activities. Because of the advantages of union membership and the need to disclose it for employment it is not generally concealed or denied. Accordingly, we cannot presume that individuals would give up their union status, and corresponding assurance of well paid jobs, simply because the Grand Jury knows they are union members and petitioners have not demonstrated that organizational activity would be curtailed because of the delivery of the lists. *Waterfront* is also distinguishable because there the requesting governmental body had access to the names and addresses of the longshoremen from another source, the Commission's membership list, a fact which certainly affected the balancing process performed by the courts. Some of the information here also could be obtained from other sources, as the District Attorney conceded, but not from any central list, only by far more intrusive searches through countless personal records. Finally, while a random selection of names in *Waterfront* sufficiently served the Commission's interest in determining whether coercion of the union rank and file existed, in this case we agree with the courts below, after examining the transcript of the *in camera* hearing, that the District Attorney has established that a random selection of names would not adequately serve the Grand Jury's purpose.

III

Petitioners also contend that the subpoenas are so broadly drafted that they violate the Fourth Amendment's prohibition against unreasonable searches and seizures. The Supreme Court has stated that the Fourth Amendment provides protection against a Grand Jury subpoena duces tecum "too sweeping in its terms to be regarded as reasonable" (*Hale v Henckel*, 201 US 43, 76; *see also, United States v Dionisio*, 410 US 1, 11-12 [dictum reaffirming principle]). We have made clear, how-

ever, that a subpoena duces tecum, unlike a search warrant, does not have to be supported by probable cause (*Matter of Hynes v Moskowitz*, 44 NY2d 383, 394, *appeal dismissed* 439 US 921).

The standard of reasonableness rather than probable cause is appropriate because of the substantial differences between a search warrant and a subpoena duces tecum. A search and seizure is conducted abruptly, without advance notice, often with force or the threat of force. A subpoena, in contrast, remains at all times under the control and supervision of a judicial officer and may be challenged before compliance through a motion to quash (*see, id.* at 394; *United States v Doe* [*Schwartz*], 457 F2d 895, 898, *cert. denied* 410 US 941). Moreover, the unannounced search and seizure of documents often results in serious social stigma. A subpoena is served in the same manner as any summons or other legal process and typically no stigma whatsoever attaches if it is enforced. Indeed, the distinctions between warrants and subpoenas are so evident that it has been suggested by some courts that the restrictions on overbroad subpoenas duces tecum rest not on the Fourth Amendment's prohibition against unreasonable searches and seizures, but on the less rigid requirements of the due process clause (*see, In re Horowitz*, 482 F2d 72, 75-79 [Friendly, J.] *cert. denied* 414 US 867, *reh. denied* 414 US 1052; *United States v Doe* [*Schwartz*], 457 F2d 895, 900, *supra*; *People v Doe*, 84 AD2d 182, 201, n14 [all cases reviewing applicable Supreme Court precedent]). Whatever the source of the constitutional right of an individual to be free from overly broad subpoenas duces tecum, "all that is required under the State and Federal Constitutions is that the subpoenaed materials be relevant to the investigation being conducted and that the subpoena not be overbroad or unreasonably burdensome" (*Matter of Hynes v Moskowitz*, 44 NY2d 383, 394, *supra* [citations omitted]; *see also, See v City of Seattle*, 387

US 541, 544; *Oklahoma Press Pub. Co. v Walling*, 327 US 186, 208-209).

Based on this standard, we conclude that the subpoena is neither overly broad nor burdensome and that the information sought is relevant.

It is useful to compare this case with *Hale v Henckel* (*supra*), where the Supreme Court found the subpoena to be overly broad and unduly burdensome. In that case the Court stressed the fact that if the subpoena were enforced as written it would "completely put a stop to the business of [the] company" (201 US at 77). Here, by contrast, the subpoena only requests that the Locals submit a copy of the membership lists. Nor is the subpoena subject to criticism on the grounds of vagueness or, using Fourth Amendment terminology, lack of particularity in the description of the documents sought. The Locals were told specifically what they were obligated to produce, the tasks required only a matter of minutes to accomplish and it did not interfere with the Locals continued operation.

Petitioners contend further that the names, addresses and social security numbers of every member of all four Locals are not relevant. The District Attorney contends that to limit the subpoena to one Local, to a portion of the membership of one or more Locals, or to certain job sites would immediately signal the suspected parties and that it would not be adequate because he has no way of knowing which members, for example, witnessed bribes, the illegal violation of collective bargaining agreements or other corrupt activities. He agrees that the information subpoenaed is not necessary in all cases and that some areas of inquiry do not relate to all the Locals but he asserts that narrowing the demand to produce would clearly indicate the areas of investigation and potential charges against each Local and those members who are believed to have knowledge, information which could seriously impede the investigation. His claim is supported

by the material revealed to the Trial Justice during the *in camera* hearing.

Relevancy, of course, cannot be reduced to a formula; only general guidelines can be restated. We have often noted the Grand Jury subpoenas are presumptively valid and can only be quashed by proving an affirmative act of impropriety or bad faith (*Virag v Hynes*, 54 NY2d 437, 442-443; *Matter of Additional Jan, 1979 Grand Jury of Albany Supreme Ct. v Doe*, 50 NY2d 14, 20; *Matter of Manning v Valente*, 272 App Div 358, 361, *supra*). The party seeking to quash a subpoena duces tecum must "demonstrate 'that a particular category of documents can have no conceivable relevance to any legitimate object of investigation by the * * * Grand Jury'" (*Virag v Hynes*, 54 NY2d 437, 444, *supra*, quoting *Matter of Horowitz*, 482 F2d 72, 80, *supra*). Petitioners' attempt to distinguish *Virag v Hynes* on the ground that it did not involve an assertion of the Fourth Amendment's right to be free from unreasonable searches and seizures fails because the standards set forth in *Virag* satisfy all Fourth Amendment concerns.

Addressing briefly the points raised by the dissent, both the Locals and the People extensively argued the applicability of the First Amendment claim in the moving and responding papers and in their briefs to Supreme Court. While the trial court did not issue a written decision when it denied petitioners' motion, it had the applicable law presented to it and necessarily engaged in a balancing process before denying the motion to quash. Whether it did so or not is academic at this stage, however, because we have reviewed the record and balanced the competing interests and conclude its decision was correct. Insofar as the dissent contends that the union offered alternatives to compromise the matter, the alternatives were suggested for the first time in the Appellate Division. Finally, although the assistant district attorney conceded the obvious, that not all members of the Locals

would be called to testify before the Grand Jury, he insisted on the need for all names because at this stage of the investigation it is impossible to determine which members had pertinent information and because it is important that all names be delivered so that the investigation will not be endangered.

IV

We have reviewed the Locals' remaining contention that the Labor Management and Reporting Act of 1959 (*see*, 29 USC § 481) shields disclosure of the membership lists to a Grand Jury and conclude that it is without merit.

Accordingly, the order of the Appellate Division should be affirmed.

Titone, J. (dissenting).

I agree with the majority's conclusion that the controversy presented on this appeal is not moot. I also agree that the Union membership's Fourth Amendment rights have not been violated. Although I agree with my colleagues that there is a compelling state interest initially justifying disclosure of the Locals' membership lists, we differ as to whether the subpoenas, as issued, were overbroad. Inasmuch as I find that the lower courts failed to properly balance the admittedly compelling governmental interest in disclosure with the First Amendment rights of the Union members, I would reverse and remit for a new hearing.

As a result of a New York County Grand Jury investigation into corruption in the carpentry and drywall industry, the District Attorney issued subpoenas duces tecum to four Locals of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO. Although the Union's officials were the primary targets of the investigation, the subpoenas sought the entire membership lists of all four locals, consisting of some 10,000 names, addresses, home telephone numbers, and social security numbers. Contending that the broad disclosure requested by the District Attorney implicated the First Amendment rights of the membership, the Union sought to quash the subpoenas. Alternatively, the Union argued that the subpoenas were overbroad, and requested that the disclosure be limited to what was reasonably necessary to serve the legitimate needs of the investigation.

In issuing the subpoenas in an *ex parte* proceeding at which only the District Attorney's office was represented, not one word was mentioned regarding the First Amendment rights of the Union membership. After the Union moved to quash the subpoenas on First Amendment grounds, the Supreme Court failed to indicate whether it had even considered the constitutional claim or balanced the conflicting rights of the Government and the

members of the Locals. Similarly, there is nothing in the record to indicate that the courts below carefully scrutinized the reasonableness of the District Attorney's demands or considered the feasibility of less restrictive alternatives. Whether or not the Appellate Division considered the Locals' constitutional claim is also unknown, since that court affirmed without opinion.

What is known is that even the assistant district attorney admitted that not all of the names of the membership lists were necessary to the investigation. Nevertheless, the majority concludes that "the District Attorney's continued possession of the membership lists . . . does not violate the constitutional rights of the Union Locals or their members" (slip opn at 2). This holding is contrary to the controlling Federal case law.

Although acknowledging the substantial First Amendment interest involved, the majority minimizes the significance of the arguments advanced by the Union in support of its position. The Locals do not merely contend that individuals may be deterred from joining the Union, and that members may be discouraged from engaging in Union activities. Rather, the Locals assert that forced disclosure of all 10,000 names, addresses, phone numbers, and social security numbers of its members infringes on associational, and privacy rights by chilling the exercise of First Amendment rights of the rank-and-file. The Union points out that with its members' social security numbers, the government now has access to the tax returns, financial and other personal information of each and every Union member. Fear of becoming visible may well cause some members to refrain from fully exercising their right to engage in the full range of Union activities, which include political as well as economic and social activities. With the entire membership's home telephone numbers in his possession, the District Attorney may contact the rank-and-file at home any time he wishes. In sum, the Union's position is that "the First Amend-

ment protects one's freedom of association, privacy and freedom to participate in a political life without unjustified governmental interference". To further support its contention that disclosure here may adversely affect the Union, and thereby chill the exercise of constitutionally protected rights, the Locals point out the undisputed fact that newspapers have already reported on the investigation as a result of a news leak. These issues were explicitly raised below and again before this court in the Union's brief, and, by implication, in the cases cited by the Locals.

A demand by the government that seeks to obtain constitutionally protected materials is subject to the most exacting scrutiny. "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment. . . . Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny" (*NAACP v Alabama*, 357 US 449, 460-461). Regardless of how compelling the state interest may be, that interest must be balanced against the deterrent effect that the requested "disclosures may well have on the free exercise by [the Locals'] members of their constitutionality protected right of association" (*NAACP v Alabama, supra*, at 463, *citing American Communications Assn. v Douds*, 339 US 382, 400; *see generally, Buckley v Valeo*, 424 US 1, 25, 44-45). "Compelled disclosure is not permitted unless it is substantially related to a compelling governmental interest" (*Local 1814, International Longshoremen's Assn., AFL-CIO v Waterfront Commn. of New York Harbor*, 647 F2d 267, 271, *supra, citing Buckley v Valeo, supra*, at 64).

Nevertheless, the majority perceives no problem in requiring the Locals to turn over these membership lists and social security numbers because they believe that the locals "have not demonstrated that organizational activity would be curtailed because of the lists" (slip opn at 9). Even if we were to agree with this premise, we would still be compelled to dissent because this approach is contrary to the well-established constitutional principles enunciated in a long line of federal cases (*see, e.g., Buckley v Valeo, supra*; *Pollard v Roberts*, 393 US 14 [per curiam], *affg* 283 F Supp 248; *Shelter v Tucker*, 364 US 479; *Tulley v California*, 362 US 60; *Bates v City of Little Rock*, 361 US 516; *NAACP v Alabama*, 357 US 449; *Local 1814, International Longshoremen's Assn., AFL-CIO v Waterfront Commn. of New York Harbor*, 647 F2d 267). Once it was determined that First Amendment rights were implicated here, the governing federal precedents required that the burden shift to the government to show that there was a compelling state interest. The District Attorney also had to show that there was no less restrictive intrusion into the Union's records that would reasonably satisfy the needs of the investigation. We were obligated to balance the conflicting interests of the Union and the government and perform the most exacting scrutiny regarding the People's disclosure demand.*

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* The majority points out that "the effect subpoenas have on the membership of a union and participation in its activities is quite different from the effect they may have on membership in a political group or participation in its activities. The benefits of union membership and the need to reveal it to obtain employment are obvious." However, we see a vast distinction between a union member voluntarily deciding to provide an employer with his social security number and union membership information, and the situation presented here, where the State seeks to compel this disclosure. The former represents a freely made choice. The latter represents an intrusion by the Government into the privacy rights of the individual, as well as implicating the associational rights of the members, since disclosure was demanded solely based on union

Although the majority attempts to distinguish the cases relied on by the Locals, the facts presented here fall squarely within the dictates of those cases. Indeed, the facts of this case are closely analogous to those of *Local 1814, International Longshoremen's Assn., AFL-CIO v Waterfront Commn. of New York Harbor* (*supra*). In *Waterfront*, the government sought disclosure of approximately 450 names of Union members who contributed to the Union's political fund during a specified period of time as part of an investigation into corruption. The court denied such broad disclosure, and restricted the governmental access to only 10% of the names originally sought, finding that this would "limit the impairment of longshoremen's First Amendment rights without compromising the Commission's legitimate investigative needs" (*Local 1814, International Longshoremen's Assn., AFL-CIO v Waterfront Commn. of New York Harbor, supra*, at 274). Were the same sort of scrutiny applied here, it is likely, given the record before us, that the requested disclosure would have been similarly limited.

The majority distinguishes the *Waterfront* case on the ground that it involved political speech. This implies that First Amendment rights were actually somehow capable of being prioritized into some descending order of importance. Federal law dictates otherwise. All fully protected First Amendment rights—whether involving association, privacy, speech, religion, or economics—are entitled to the identical protection and strict scrutiny that political speech enjoys (*see, NAACP v Alabama, supra*; *Local 1814, International Longshoremen's Assn., AFL-CIO v Waterfront Commn. of New York Harbor, supra*).

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membership. It is difficult to believe that the average union member would not regard a government demand for the names, home phone numbers and social security numbers of every member an intrusion into their privacy. Indeed, we contend that most people would be concerned when a governmental investigatory body demands such personal information.

Further, the Locals do indeed argue that the free exercise of the rank-and-file's political rights are being violated insofar as these rights are intimately bound up with participating in the political activities of the Locals.

More importantly, the initial inquiry is not on the specific First Amendment rights asserted. Rather, the court must inquire into whether the disclosure requested by the government "is substantially related to a compelling governmental interest" (*Local 1814, International Longshoremen's Assn., AFL-CIO v Waterfront Commn. of New York Harbor, supra*, at 271). Once it is ascertained that First Amendment Rights are implicated, the burden shifts to the Government to justify the legally compelled disclosure.

The majority further attempts to distinguish *Waterfront* on the ground that the requesting governmental body actually had access to the names and addresses of the Longshoremen from another source, thereby minimizing the government's need for the disclosure, while here, the information was not readily available. This argument, however, cuts both ways. Before the judiciary permits compelled disclosure of personal information that is otherwise difficult to obtain, it has an obligation to strictly scrutinize the reasonableness of such a request. But in any event, this was at most a minor factor in the *Waterfront* decision. Before considering the availability of the information from public sources, we are first obligated to scrutinize the District Attorney's demands.

There is, however, a valid ground upon which to distinguish the instant case from *Waterfront* that mandates reversal. In *Waterfront*, the government sought some 450 members names, all of which had some direct relevance to the investigation. In this case, the government sought some 10,000 names and addresses, as well as home phone numbers and social security numbers, even though the government itself admitted that not all the informa-

tion was relevant to the investigation. Further, as the majority aptly points out, in *Waterfront*, the disclosure sought was limited. The criteria used to determine whether a member's name had to be disclosed was predicated on whether the union member signed a political contribution card after a specific date. In our case, however, the District Attorney demanded the name of every Union member, regardless of which Local they belonged to, and regardless of whether the member was a potential source of relevant information who might shed some light on the investigation. In the instant case, there was absolutely no limiting criteria. Thus, every member whose involvement in the Union was politically motivated, as well as those members whose Union participation was economically or socially motivated, was demanded. In other words, the disclosure at issue here was far more intrusive than that presented in *Waterfront*.

Finally, the majority contends that "in this case the assistant district attorney established during the *in camera* hearing that a random selection of names would not adequately serve the Grand Jury's purpose" (slip opn at 9). We have reviewed the materials submitted to Justice Roberts, and two things become apparent. First, there was absolutely no showing that the First Amendment implications were even considered and it appears that no balancing at all was done before or after the subpoenas were issued. On this relatively barren record, we decline the invitation of the District Attorney to speculate as to whether or not the lower courts properly balanced the conflicting interests at issue.

Second, the assistant district attorney indicated to the issuing Magistrate that the primary target of the investigation was only one of the four locals. Indeed, the District Attorney's main justification for this sweeping disclosure was that to limit the subpoenas would immediately signal the suspected parties and jeopardize the investigation. This excuse is insufficient to warrant the

full disclosure of the entire membership lists of all four Locals, since there were viable alternatives that could have been employed that would satisfy the reasonable needs of the investigation without infringing upon the First Amendment rights of the membership to such an intrusive degree. For example, the lists of names unrelated to the investigation could have been held by a neutral third party, as suggested by the Locals, disclosure could have been limited to a percentage of the total Union population, as was done in the *Waterfront* case. However, apparently, neither the majority nor the courts below even considered such reasonable alternatives. Indeed, no alternatives were considered.

Had the required balancing been done, and the requested disclosure been subjected to the demanding constitutional scrutiny required, it is inevitable that the broad disclosure demanded would have been significantly limited.

Accordingly, I would reverse and remit for a proper hearing.

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Order affirmed, with costs. Opinion by Judge Simons in which Chief Judge Wachtler and Judges Kaye and Hancock concur. Judge Titone dissents and votes to reverse in an opinion in which Judges Alexander and Bellacosa concur.

Decided July 6, 1988

## APPENDIX B

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on May 21, 1987.

---

Present—Hon. LEONARD H. SANDLER, Justice Presiding,
JOHN CARRO,
E. LEO MILONAS,
ERNST H. ROSENBERGER,
GEORGE BUNDY SMITH, Justices.

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30082N

IN THE MATTER OF GRAND JURY SUBPOENAS FOR LOCALS 17, 135, 257 and 608 of the UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO,
*Appellants.*

v.

THE PEOPLE OF THE STATE OF NEW YORK,
*Respondent.*

---

An appeal having been taken to this Court by the above-named appellants from the order and judgment (one paper) of the Supreme Court, New York County (George Roberts, J.), entered on April 6, 1987,

And said appeal having been argued by William J. Dealy and Daniel P. Hollman, of counsel for the appellants, and by Robert M. Pitler, Robert A. Mass and Michael F. Bachner, of counsel for the respondent People of the State of New York; and due deliberations having been had thereon,

It is unanimously ordered that the order and judgment (one paper) so appealed from be and the same hereby is affirmed, without costs and without disbursements.

ENTER:

/s/ Harold J. Reynolds
Clerk

## APPENDIX C

At Part 30 of the Supreme Court of the State of New York held in and for the County of New York at the Criminal Courthouse Room 1104 on the 6th day of April, 1987

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Present: HON. GEORGE F. ROBERTS
*Justice.*

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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Index No. 04795/87

IN THE MATTER OF GRAND JURY SUBPOENAS FOR LOCALS 17, 135, 257 and 608 of the UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO

---

ORDER AND JUDGMENT

Movants, Locals 17, 135, 257 and 608 of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO (collectively referred to as "Carpenter Locals" and individually referred to as "Local 17," "Local 135," "Local 257" and "Local 608") having moved by Notice of Motion dated March 2, 1987 for an Order pursuant to CPLR § 2304 and § 610.10 and § 610.25 of the Criminal Procedure Law to quash and/or vacate four (4) subpoenas duces tecum dated January 29 and January 30, 1987 which were issued to the Carpenter Locals; and

NOW, upon reading and filing the Notice of Motion dated March 2, 1987 the Affidavit of Daniel P. Hollman, Esq. in support of the Motion and the Memorandum of Law dated March 2, 1987 submitted in support of the Motion and the Affirmation of Robert A. Mass, Esq. affirmed on March 24, 1987 and the Memorandum of

Law submitted on behalf of the District Attorney dated March 24, 1987 and upon reading the Reply Affidavit of William J. Dealy, Esq. and the Reply Memorandum of Law submitted on behalf of the Carpenter Locals and the Motion having duly come on to be heardbefore this Court on March 26, 1987 and said motion having been submitted and the parties having appeared before this Court on April 1, 1987 at which time this Court held an *in camera* hearing with Robert Mass of the District Attorney's office;

NOW, upon the foregoing Affidavits, Affirmation and Memoranda of Law and all prior pleadings and proceedings heretofore had herein; and it is

ORDERED that the motion of the Carpenter Locals to quash and/or vacate the Subpoenas is denied and the Subpoenas are enforced to the effect that the Carpenter Locals, namely Local 17, Local 135, Local 257 and Local 608 are directed to comply with the subpoenas duces tecum on or before April 9, 1987 by producing lists containing the names, addresses, telephone numbers and social security numbers of the members of the four (4) Carpenter Locals; and it is further

ORDERED that on behalf of the District Attorney's office the aforementioned list of the names, addresses, telephone numbers and social security numbers of the members of the four (4) Carpenter Locals will remain under the direction and control of Robert Mass, Esq. and, will not be duplicated in whole and will ultimately be returned to the Carpenter Locals after the Grand Jury investigation is completed; and it is

ORDERED that the clerk is directed to enter this final Order and Judgment of this Court.

ENTER:

/s/ George F. Roberts
J.S.C.

Part 30 Apr. 6, 1987

## APPENDIX D

STATE OF NEW YORK
COURT OF APPEALS

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At a session of the Court, held at Court of Appeals Hall in the City of Albany on the seventh day of May A.D. 1987

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Present, HON. SOL WACHTLER, *Chief Judge, presiding.*

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1-12 Mo. No. 468

IN THE MATTER OF GRAND JURY SUBPOENAS FOR LOCAL 17, 135, 257 and 608 of the UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO

---

A motion for leave to appeal to the Court of Appeals and for a stay in the above cause having heretofore been made upon the part of the appellants Local 17, 135, 257 and 608 of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO, herein, papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the appeal taken as of right be and the same hereby is dismissed, without costs, on the Court's own motion, and motion for leave to appeal be and the same hereby is dismissed, each upon the ground that the order of the Appellate Division does not finally determine the proceeding within the meaning of the Constitution; and it is

ORDERED, that the said motion for a stay be and the same hereby is dismissed as academic.

/s/ Donald M. Sheraw
Clerk of the Court

## APPENDIX E

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on April 16, 1987

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Present—

Hon. THEODORE R. KUPFERMAN, Justice Presiding
JOSEPH P. SULLIVAN
DAVID ROSS
E. LEO MILONAS
RICHARD W. WALLACH, Justices

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M-1525

IN THE MATTER OF GRAND JURY SUBPOENAS FOR LOCALS 17, 135, 257 and 608 of the UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO

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Appellants Locals 17, 135, 257, and 608 of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO having moved for a preliminary appellate injunction in respect to the subpoenas duces tecum served herein, pending hearing and determination of their appeal from an order and judgment (one paper) of the Supreme Court, New York County, entered on April 6, 1987,

Now, upon reading and filing the papers with respect to said motion, and due deliberation having been had thereon,

It is ordered that said motion be and the same hereby is denied.

ENTER:

/s/ Harold J. Reynolds
Clerk

## APPENDIX F

### EXCERPTS FROM GOVERNMENT'S BRIEF TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK

Appellants' further claim, that the social security numbers of the union membership are not relevant to the grand jury, is also without merit. Having the social security numbers would allow the grand jury to identify and then locate people with similar names (through, for example, comparing the social security numbers of two people with similar names with the number appearing on the records of an employer for whom the potential witness worked) and to more easily conduct background checks on potential witnesses (through, for example, using the number to obtain a criminal history). Such information is thus necessary for the proper conduct of the grand jury investigation.

## APPENDIX G

## EXCERPTS FROM GOVERNMENT'S BRIEF TO THE NEW YORK COURT OF APPEALS

A. Compliance With The Grand Jury Subpoenas Has Not Infringed on the Carpenters' First Amendment Rights (Answering Appellants' Brief, Point I).

No one familiar with the history of the labor movement in this country would deny that the First Amendment right of association must extend to labor unions. But, despite appellant's apparent conclusion to the contrary, that does not mean that unions are beyond the reach of legal process. In this case, there was a compelling state interest in the information sought by the subpoenas and the means used to obtain that information were reasonable. Hence, there was no violation of the union membership's First Amendment rights.

## APPENDIX H

*New York Daily News—Monday, May 25, 1987*

### UNION PAYOFFS SEEN

USE OF ILLEGAL IRISH ALIENS AS 'MUSCLE' ALSO PROBED

BY KEVIN MCCOY and FRANCES MCMORRIS
Daily News Staff Writers

A Manhattan grand jury probe of construction industry corruption is examining whether carpenters union officials gave jobs to illegal Irish aliens, some of whom served as "muscle" for a top union leader.

The grand jury is looking into the connection between the union leaders and the illegal immigrants as part of a broad probe of alleged payoffs to the unions from building contractors seeking labor peace and permission to employ nonunion workers.

The corruption case, expected to lead to indictments next month, includes information developed from the May 1986 wounding of Carpenters Local 608 President John F. O'Connor, who authorities say was shot at the behest of mob boss John Gotti.

'Cost of doing business'

O'Connor's unit, known as the "Irish local," and three other locals are targeted in the probe. They have more than 10,000 members and control all carpentry work in Manhattan and parts of the other boroughs.

"This case will show the extortion and payoffs that are a big part of the cost of doing business in the city," said one prosecution source, comparing the case to the racketeering trial of concrete industry executives.

'Fishing expeditions'

Details came to light last week in a court battle over the membership lists of Locals 608, 257, 135 and 17. The Manhattan district attorney's office demanded members' names, addresses, telephone numbers and Social Security numbers in an effort to locate witnesses to payoffs and illegal immigrants hidden by the unions.

Defense lawyers called the subpoenas "fishing expeditions." However, union officials were ordered to turn over the information after a closed-door session April 2 before Supreme Court Justice George Roberts.

The district attorney's office refused to discuss the case, and union attorneys could not be reached.

Investigators believe that union members, possibly including illegal Irish immigrants, trashed the Bankers and Brokers Restaurant at Battery Park City last year. Law enforcement sources said O'Connor allegedly ordered the destruction because the restaurant owners—who include reputed Gambino crime family associate Philip Modica—refused to make payoffs for using non-union workers during construction of the eatery.

'Rocket in his pocket'

After the restaurant trashing, a federal wiretap recorded Gotti referring to the union boss and telling henchmen to "put a rocket in his pocket," law enforcement sources said. Days later, O'Connor was shot.

Kevin Kelly, a member of the now-defunct Westies, a gang of Irish-American hoods, was indicted in the shooting but is still at large. O'Connor was indicted last September on bribery, coercion and criminal mischief charges for his alleged role in the restaurant incident.

No. 88-400 (2)

Supreme Court, U.S.
FILED
OCT 28 1988
JOSEPH F. SPANIOL, JR.
CLERK

In the

# Supreme Court of the United States

October Term, 1988

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**LOCALS 17, 135, 257 and 608 OF THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO,**

*Petitioners,*

*-against-*

**THE PEOPLE OF THE STATE OF NEW YORK,**

*Respondent.*

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On Petition for Writ of Certiorari to the Court of Appeals of the State of New York

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## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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No. 88-400

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1988

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LOCALS 17, 135, 257 and 608 of the UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO, :

Petitioners, :

-against- :

THE PEOPLE OF THE STATE OF NEW YORK, :

Respondent. :

----------x

# BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

## PRELIMINARY STATEMENT

On July 6, 1988, the New York State Court of Appeals upheld the denial by the Supreme Court, New York County (George Roberts, J.), of a motion to quash four grand jury subpoenas served on Locals 17, 135, 257 and 608 of the United Brotherhood of Carpenters and Joiners of America (the "petitioners"). The Court

of Appeals held that those subpoenas do not violate the petitioners' constitutional rights.

## STATEMENT OF THE CASE

On December 8, 1986, a New York County Grand Jury began a large-scale investigation into corruption in the carpentry and drywall industry and, in particular, in the Carpenters Union, which has a long history of corruption. That investigation followed the receipt of information from an informant that certain union officials were taking bribes and many months of subsequent court-ordered electronic surveillance. The primary focus of the investigation was the criminal activity of the union's officials. As part of that investigation, on February 17, 1987, four grand jury subpoenas were served on

petitioners. The subpoenas were identical in content -- each requested a list of the members of the local, and their home addresses, telephone numbers and social security numbers.

On March 2, 1987, petitioners moved to quash these subpoenas. An in camera hearing was held on April 2, 1987, before the judge supervising the grand jury. At that hearing, two assistant district attorneys informed the court that the focus of the grand jury investigation was corruption within the union leadership, not within the rank and file membership, and that the membership lists would assist the grand jury in identifying and locating possible witnesses to this corruption.

The prosecutors presented two reasons for subpoenaing the entire membership list of each local. First,

although specific job sites and individuals were the subject of the investigation, limiting the subpoenas to the union members working at those sites or with those individuals would have, in effect, revealed to the targets of the investigation (the officials with custody of the list) the names of the witnesses who would likely be subpoeaned to testify against them in the grand jury. That would raise the specter that the targets might tamper with witnesses.

In addition, while specific job sites and the names of specific individuals had arisen during the investigation, the possible corruption was not limited to those sites and individuals. Furthermore, additional details of the corrupt schemes under investigation were divulged to the hearing court in camera, demonstrating

the need not only for the four complete membership lists but for the social security numbers of the members as well.

At the conclusion of the hearing, the court was satisfied that the state had a compelling interest in issuing the subpoenas, that the subpoenas sought information relevant to the grand jury investigation, and that the subpoenas were neither unduly burdensome nor overbroad. In addition, the court found that the government had made a sufficient showing of "materiality and relevance." The court therefore denied in its entirety petitioners' motion to quash and ordered production of the documents by April 9, 1987. The judge directed petitioners to comply with the subpoenas by turning over these lists to an assistant district attorney who would hold them, prevent them from being

duplicated, and return them to the locals once the investigation had been completed. The hearing court also denied petitioners' application for a stay pending appeal.

On April 6, 1987, petitioners filed a notice of appeal and an application for a stay with the Appellate Division, First Department, of the New York Supreme Court. On April 8, 1987, both parties appeared before a Justice of the Appellate Division who granted an interim stay, explicitly not on the merits, in order to afford a full bench the opportunity to consider the stay application. The People's response to the stay application included a sealed affirmation. On April 16, the Appellate Division denied petitioners' motion for a stay.

Later that day, petitioners filed a notice of appeal from the Appellate Division's order denying the stay and made an application for an interim stay in the Court of Appeals. On April 17, Judge Judith Kaye denied petitioners' motion for a stay. However, Judge Kaye signed an order to show cause why the Court of Appeals should not enter an order staying the hearing court's original order denying the motion to quash, pending the appeal of the Appellate Division order denying a stay. The Court of Appeals thereafter denied an interim stay and ultimately dismissed the appeal from the order of the Appellate Division denying a stay. 69 N.Y.2d 983 (1987). Petitioners then complied with the subpoenas.

In the meantime, on May 21, 1987, the Appellate Division affirmed the

order and judgment of the hearing court denying petitioners' motion to quash.* 130 A.D.2d 987 (1st Dep't 1987). Petitioners then appealed to the New York Court of Appeals, asserting as they did below that the subpoenas violated the First Amendment by having a "chilling effect" on the members' right of free association.**

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*This Court can take judicial notice of the official records of the Supreme Court, New York County, which show that, thus far, the investigation has resulted in the indictment of five union officials for crimes including conspiracy, bribe-receiving, grand larceny, coercion and criminal violations of the Labor Law, and of one other union representative for perjury and criminal contempt. N.Y.Co. Ind. Nos. 7950/87, 7951/87, 7952/87, 7953/87 and 9352/87. The dismissal of one of these indictments is currently being appealed.

**In addition, petitioners argued that the subpoenas violated the Fourth Amendment because they were unduly broad and unreasonable and that union membership lists were privileged from disclosure. They do not raise either of these claims in the instant petition.

On July 6, 1988, the Court of Appeals rejected petitioners' claims and affirmed the decision of the Appellate Division. 72 N.Y.2d 307 (1988). Writing for the majority, Judge Simons, applying the test set forth in Brown v. Socialist Workers '74 Campaign Committee, 459 U.S. 87 (1982), concluded that it is unquestionable that "the State has a compelling interest in preventing and fighting corruption in the construction industry" and that a grand jury investigation is an appropriate means of realizing that interest (Opinion at 4a).* The court went on to find that the four membership lists sought by the grand jury subpoenas bear a substantial relation to the investigation "because they will enable the Grand Jury to locate and

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*Page references followed by "a" are to the Appendices to the Petition.

identify ... potential witnesses for Grand Jury testimony, without unduly burdening or delaying the search and without ... exposing witnesses to possible intimidation." Id.

REASONS FOR DENYING THE WRIT

1. Although petitioners suggest that the Court of Appeals "failed to apply the exacting standard" enunciated in Brown v. Socialist Workers '74 Campaign Committee, 459 U.S. 87, 92 (1982), "for justifying First Amendment intrusions" (Petition at 6), in the end, even they retreat from such a claim. Rather, the thrust of their argument is that the court misapplied the Brown test. Because the only question presented is whether the state courts properly concluded that the state satisfied the appropriate standard, there

is no substantial federal question for this Court to review. Nor does the record below support petitioners' related claims that the subpoenas are not substantially related to the grand jury investigation and that they are unnecessarily broad.

To begin, there is no dispute between the parties with respect to the standard for judging whether the state's subpoenas impinge inappropriately on First Amendment interests: First, the interest of the state served by the subpoena must be compelling. Second, there must be some "substantial relation" between that governmental interest and the information required to be disclosed. Brown v. Socialist Workers '74 Campaign Committee, 459 U.S. 87, 92 (1982); Buckley v. Valeo, 424 U.S. 1, 64 (1976); Gibson v. Florida Legislative Committee,

372 U.S. 539, 546 (1963); accord In re Grand Jury Proceedings, 776 F.2d 1099, 1102-1103 (2d Cir. 1985) (citing relevant cases).

Petitioners do not now, nor did they below, contest that the state has a compelling interest in pursuing this grand jury investigation. After all, as this Court has made clear, "the investigation of crime by the grand jury implements a fundamental role of securing the safety of the person and property of the citizen" and, as such, is sufficiently compelling to outweigh a First Amendment interest. Branzburg v. Hayes, 408 U.S. 665, 700 (1972).

Moreover, contrary to petitioners' claims, the Court of Appeals correctly found a "substantial relation" between the grand jury's investigation and the membership lists. As Judge

Simons noted, this relation was made clear at the in camera hearing (Opinion at 7a). In addition to this in camera information, the government demonstrated that the membership lists would enable the grand jury to determine the extent of criminal penetration of the locals, to identify the individuals involved, and, most importantly, to locate and identify witnesses. Since petitioners' only complaint pertains to the state courts' assessment of the government's showing and this Court generally defers to the state court's assessment of facts, there is no reason to grant certiorari in this case. Grayson v. Harris, 267 U.S. 352, 358 (1925).

Petitioners, however, are under the misapprehension that the "Court of Appeals failed to require the government to meet this Court's exacting standard,

apparently because the underlying investigation was not directed at union expressive activity" (Petition at 10). They seem to think that because the state courts here did not limit the subpoena as the court did in Local 1814 Int'l Longshoremen's Ass'n v. Waterfront Comm'n, 667 F.2d 265 (2d Cir. 1981), they did not apply the standard at all. That is not true.

In the Waterfront case, the balancing of the governmental interest against the First Amendment intrusion simply yielded a different result on different facts. First, the subpoena in that case called for the names of those union members who contributed to political parties and political action committees. The subpoena thus sought information about members' political expression, and as a result raised fears

of harassment and reprisals. See, e.g., NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958); Bursey v. United States, 466 F.2d 1059 (9th Cir. 1972); Doe v. Martin, 404 F.Supp. 753 (D.D.C. 1975). But as the New York Court of Appeals sensibly concluded, "the effect subpoenas have on the membership of a union ... is quite different from the effect subpoenas may have on membership in a political group ..." (Opinion at 6a-7a). Second, in Waterfront, unlike here, the information actually needed by the government would inevitably have been obtained from another source without subpoenaing the local (Opinion at 7a). Third, in Waterfront the court ordered that a random selection of names from the union list be provided to the Commission, and that sufficiently served the Commission's purpose. Here, as the

state courts concluded, such a random selection would not suffice. Because of these considerable differences, the Court of Appeals concluded that the intrusion here was less significant, and the state's need greater, than in Waterfront and hence that there was no need for further narrowing of the subpoenas. Id.

The primary concern of the dissenting judges in the Court of Appeals was that the hearing court "failed to indicate whether it had even considered the constitutional claim or balanced the conflicting rights of the Government and the members of the Locals" (Dissenting Opinion at 12a-13a). Of course, there is no requirement that the court make a record of its balancing of competing interests. And here both sides agreed in the hearing court that the issue the court had to resolve was the

constitutional claim, and thus it is inconceivable that the hearing court did not pass on the question. In any event, the Court of Appeals majority specifically addressed the issue, stating that "we have reviewed the record and balanced the competing interests and conclude the [hearing court's] decision was correct" (Opinion at 10a). Notably, even the dissenters would not have reversed the decision of the hearing court based on a determination that the subpoenas violated the members' constitutional rights. Instead, they urged that the matter be remanded to the hearing court so that the court might make a record of what it considered in denying petitioners' motion. The dissent, therefore, does not even state an adequate basis for reversal.

Petitioners also suggest that the Court of Appeals failed "to examine the scope of the subpoenas to ensure they were drawn as narrowly as possible consistent with the government's objectives" (Petition at 16). But the court explicitly addressed that question and concluded that the only other way the grand jury could obtain the necessary information would be "by far more intrusive searches through countless personal records" (Opinion at 7a). The court also concluded "after examining the transcript of the in camera hearing, ... that a random selection of names would not adequately serve the Grand Jury's purpose." Id. Put simply, the court considered the issue of overbreadth and determined that the subpoenas could not be narrowed without undermining or prolonging the grand jury investigation.

Since both prongs of the governing test are satisfied, there is no reason for this Court to explore petitioners' particular assertions about First Amendment injuries. We note, however, that those assertions are specious, and that the subpoenas were narrowly drafted and did not significantly or unnecessarily impact on the members' First Amendment rights. Branzburg v. Hayes, 408 U.S. at 680-81. To begin, the complete membership lists were quite necessary. Contrary to petitioners' assertions, there was no less intrusive way to obtain the information contained in these documents. The subpoenas could not be "abridged," because the targets of the investigation and the worksites involved were limited in number, and an abridged subpoena would have immediately identified potential

witnesses and exposed them to possible threats and influence. Nor would a random selection of names, as had been ordered in Waterfront, have aided the grand jury. After all, because the targets were limited in number, and those who had contact with them made up but a small percentage of the membership, a truncated list might not contain the names of any witnesses, much less all appropriate witnesses.

While petitioners argue that the subpoenas "inevitably cast a chill on Union members' rights" (Petition at 11), they rely merely on conclusory unsubstantiated allegations that complying with the subpoenas would adversely affect union membership and participation in union activites. Since the subpoenas were complied with over a year ago, if their prediction was borne

out it could easily be documented. But, as the Court of Appeals observed, "petitioners have not demonstrated that organizational activity would be curtailed because of the delivery of the lists" (Opinion at 7a).

Petitioners now attempt to claim that the Courts of Appeals imposed upon them the burden "to prove the existence of an actual chill." Instead, petitioners contend, "need only show a 'reasonable probability' that [their] First Amendment rights will be implicated" (Petition at 12). But petitioners have not even satisfied the lesser burden of proof which they contend applies. They have not made a single factual allegation to support their claim of a chill. Their argument is entirely speculative and assumes that the

membership is ashamed that the union is being purged of corruption.

It is far more logical to conclude, however, that the rank and file would applaud such a purge. It is farfetched in the extreme for petitioners to suggest that union members "would give up their union status and corresponding assurance of well paid jobs, simply because the Grand Jury knows they are union members" (Opinion at 7a). Furthermore, this union has had a history of anti-corruption investigations, thus providing a record from which petitioners could demonstrate a "chilling effect," if the union members had in fact ever experienced one. Instead, the record shows that members have not deserted the union before, and there is no reason to think they will now quit a union that guarantees wages of $26

to $27 per hour. Thus, the Court of Appeals was quite accurate in finding that petitioners failed to make the necessary showing.*

In sum, the state courts applied the correct standard in determining whether these subpoenas unnecessarily infringed upon the First Amendment rights of union members. Their conclusion that the government made an adequate showing of compelling need and that the subpoenas had a substantial relation to that need was entirely reasonable and, thus, does not present a "substantial federal question" for this Court's review.

2. The Court of Appeals held that petitioners' appeal was not moot

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*The dissenting opinion suggests that petitioners had no burden at all to show the possibility of a chill. But even petitioners have conceded that they must make some kind of showing.

because the membership lists could be returned and the prosecutor's use of them would cease (Opinion at 3a). Since the question of mootness is itself a federal question, and a jurisdictional one at that, this Court is not bound by the Court of Appeals' ruling. See, e.g., De Funis v. Odegaard, 416 U.S. 312, 316 (1973); Liner v. Jafco, Inc., 375 U.S. 301, 304 (1964). We took the position below, in connection with petitioners' stay application, that an appeal would not be rendered moot after petitioners complied with the subpoenas provided they pursued their appellate avenues expeditiously. Nonetheless, the fact that more than a year has passed since the subpoenas were complied with suggests that this case is moot and thus jurisdiction is lacking. See, e.g., De Funis v. Odegaard, 416 U.S. at 317-319.

3. Petitioners' claim that the Court of Appeals decision "directly conflicts with numerous decisions of this Court" (Petition at 14) is simply wrong. Indeed, the cases petitioners cite in support of their position are readily distinguishable from this case. For instance, Buckley v. Valeo, 424 U.S. 1 (1976), involved a challenge to the Federal Election Campaign Act of 1971, which imposed ceilings on campaign contributions and expenditures. One of the constitutional challenges raised was that the law impinged on the freedom of speech and the right of association by regulating the expenditure of money by campaign organizations. After balancing the government's interest in regulating the amount of money contributed to and spent by political campaigns against the First Amendment implications, the Court

concluded that certain provisions of the law did violate the First Amendment. Of course, the facts in Buckley are decidedly different from the facts of this case. Not only were the constitutional intrusions different but so too was the competing governmental interest. The decision of the Court of Appeals in no way conflicts with this Court's decision in Buckley v. Valeo.

Similarly, there is no conflict here with Branzburg v. Hayes, 408 U.S. 665 (1972), a case in which this Court upheld grand jury subpoenas requiring newspaper reporters to turn over documents and to testify before a grand jury in connection with criminal investigations. As the Court stated, "the heart of the claim" in Branzburg was "that the burden on news gathering resulting from compelling reporters to

disclose confidential information outweighs any public interest in obtaining the information." 408 U.S. at 681. In holding that the reporters were not exempt from grand jury subpoenas, the Court specifically noted the importance of grand jury investigations and that the First Amendment privilege claimed was "conditional." 408 U.S. at 701-702. Not only were the decisions in this case in full accord with the Branzburg decision, but the Court of Appeals explicitly applied the principles of both Buckley and Branzburg.

The petitioners apparently see a "conflict" with these decisions because in each, the Court has stated that government intrusions should not be "unnecessarily broad." See also NAACP v. Alabama ex rel. Flowers, 377 U.S. 288 (1964); Shelton v. Tucker, 364 U.S. 479

(1960). The state courts here never disagreed with or ignored that principle; in fact, as discussed at p. 18, supra, the Court of Appeals considered the issue of overbreadth but simply concluded, as this Court did in Branzburg, that the subpoenas were not unduly broad. The simple fact that the state courts resolved the question against petitioners does not signify a conflict with the decisions of this Court.

In fact, the other courts that have considered general claims of a "chill" on constitutional rights in similar situations have rejected them. For example, in In re Grand Jury Subpoenas (Robert Reade), 88 L.R.R.M. (BNA) 3310 (S.D.N.Y. 1974) (Gurfein, J.), the government subpoenaed the membership lists, home addresses, dates of birth, social security numbers and current

employment status of all past and present members of Local No. 3 of the International Brotherhood of Electrical Workers union. This subpoena, although it requested 40,000 names and was significantly broader than the ones in issue, was upheld over First Amendment objections. The court rejected the "chill argument" and stated, "It can hardly be shown that the union itself would lose dues-paying members." The court further concluded that, "there is neither a showing nor even a likelihood that the production of the membership lists would result in reprisals." See also In re Grand Jury Subpoena Duces Tecum (Local 456), 90 Lab. Cas. (CCH) 12,571 (S.D.N.Y. 1980) (court rejected First Amendment claim and upheld subpoenas of "material reflecting union membership" during investigation of

corruption involving union officials); In re Faltico, 561 F.2d 109, 111 (8th Cir. 1977) (grand jury investigation into racketeering in a particular industry justified subpoena requiring disclosure of membership list of a voluntary association in the industry).

Thus, after applying the appropriate standard it was entirely proper and consistent with precedent for the state courts to decide as they did.

* * *

In sum, the instant petition does not present a "substantial federal question" for this Court's review. Moreover, the decision of the New York Court of Appeals does not "directly conflict" with any decisions of this Court. There is neither reason nor need to grant certiorari in this case to reaffirm the well-established standard

that grand jury subpoenas and other governmental intrusions must meet.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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October, 1988

Supreme Court, U.S.
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No. 88-400

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1988

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LOCALS 17, 135, 257 AND 608 OF THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO,
*Petitioners*

v.

PEOPLE OF THE STATE OF NEW YORK,
*Respondent*

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**On Petition for Writ of Certiorari to the Court of Appeals of the State of New York**

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## PETITIONERS' REPLY MEMORANDUM

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**On Petition for Writ of Certiorari to the Court of Appeals of the State of New York**

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## PETITIONERS' REPLY MEMORANDUM

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Petitioners, Locals 17, 135, 257 and 608 of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO, hereby submit their Reply Brief in response to the Brief in Opposition to Petition for Writ of Certiorari ("Brief in Opp.") filed by Respondent People of the State of New York on October 28, 1988.[1]

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[1] Respondent's Opposition to the Petition for Certiorari mischaracterizes the facts of this case. Petitioners will not attempt to cure all factual inaccuracies, but strongly dispute the suggestion that the local unions involved in this case have "a long history of corruption." That allegation is unsupported, inaccurate, and an attempt to color the Court's judgment of the legal issues presented.

## I. RESPONDENT, LIKE THE NEW YORK COURT OF APPEALS, FAILS TO RECOGNIZE THIS COURT'S REQUIREMENT THAT INVESTIGATIVE INFRINGEMENTS OF FIRST AMENDMENT RIGHTS SATISFY THE "LEAST INTRUSIVE ALTERNATIVE" TEST

Respondent makes the startling assertion that "there is no dispute between the parties with respect to the standard for judging whether the state's subpoenas impringe inappropriately on First Amendment interests . . . ." (Brief in Opp. at 11). To the contrary, there is a fundamental dispute on that point: Respondent, like the court below, has applied a two-step test and thus ignored the important third element of this Court's established test for First Amendment infringements—whether the government pursued its objectives using the least intrusive approach available to it. Respondent cites several decisions applying this third element, but consciously avoids all mention of it.[2]

Respondent does not contend that its subpoenas satisfied the "least intrusive approach" requirement, nor could Respondent plausibly do so. As Petitioners and the dissent below have noted, Respondent could have obtained

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[2] *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 68 (1976); *Shelton v. Tucker*, 364 U.S. 479, 487 (1960); *Local 1814 Int'l Longshoremen's Ass'n v. Waterfront Comm'n*, 667 F.2d 267, 273-74 (2d Cir. 1981). Respondent's attempt to place primary emphasis on *Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87 (1982), is misguided. The Brown decision considered the government's interest in compelling the disclosure of financial information about minor political parties. The Court found the government's interest was outweighed by the prospect of First Amendment injury; since the first element of the test was not met, the Court's failure to consider the third element is not surprising. Moreover, *Brown* relies on cases such as *Buckley* and *Shelton* that apply the "least intrusive alternative" requirement; accordingly, it cannot reasonably be read as endorsing a two-element test.

all the information it required through several less intrusive approaches. Appendix to Petition ("App.") at 18a-19a. The court below erred in failing to consider the third element of this Court's test and in failing to require that a less intrusive approach be employed in this case. This error raises a significant federal question worthy of this Court's consideration.

In contending that its subpoenas meet the second element of this Court's three-part test, Respondent asserts that the information sought bears a "substantial relation" to the purpose of the grand jury's investigation. (Brief in Opp. at 12). The only support for this bare assertion is Respondent's alleged *in camera* showing that possession of membership lists would serve its goal of identifying potential witnesses.[3] However, the District Attorney expressly stated that the purpose of obtaining social security numbers of 10,000 union members was to conduct a general exploration of union members' possible criminal records.[4] That sort of fishing expedition bears no substantial relation to the grand jury investigation; therefore, the request for social security numbers does not satisfy even the second element of this Court's test.

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[3] Respondent makes several references to the *in camera* proceedings, Brief in Opp. at 4-5, 12-13, 17, stating at one point that "it is inconceivable that the hearing court did not pass on the [constitutional] question." *Id.* at 17. By contrast, Judge Titone, author of the dissent below, reviewed the *in camera* materials and stated that "there was absolutely no showing that the First Amendment implications were even considered and it appears that no balancing was done before or after the subpoenas were issued." App. at 18a. Respondent apparently has chosen not to submit a transcript of those proceedings to this Court. Presumably, Respondent would have submitted the transcript if it supported Respondent's view of the hearing court's inquiry.

[4] *See* App. at 27a.

## II. LIKE THE NEW YORK COURT OF APPEALS, RESPONDENT FAILS TO RECOGNIZE THAT THE OVERBROAD SUBPOENAS IMPERMISSIBLY CHILL UNION MEMBERS' EXPRESSIVE ACTIVITIES

Respondent argues that requiring identification of union membership, including revealing social security numbers of 10,000 individual members, has not chilled protected union activity because union membership has not declined. Like the New York Court of Appeals, Respondent fails to recognize that overbroad subpoenas will chill union *expressive activities* as well as union membership. The fact that a grand jury is considering personal information concerning all members of a union may or may not lead people to forego the economic benefits of union membership; however, it will surely lead many to diminish their participation in the public and expressive activities of modern unions. As Petitioners noted in their Petition for Certiorari at 10, unions engage in extensive political activity, publish newspapers and pamphlets, and state controversial views concerning industrial relations. In *Local 1814 Int'l Longshoremen's Ass'n v. Waterfront Comm'n*, 667 F.2d 267 (2d Cir. 1981), the United States Court of Appeals for the Second Circuit recognized on the basis of similar facts that a chilling effect on First Amendment rights would be "inevitable." [5] *Id.* at 272.

Respondent argues that Petitioners have failed to advance facts demonstrating the chilling effect of the subpoenas. In fact, no such showing is required. As the Second Circuit noted in *Waterfront*, the Supreme Court has adopted a "commonsense approach" to identifying the existence of chill. *Waterfront*, *supra*, 667 F.2d at

[5] The government relies heavily on the case of *In re Read*, 88 L.R.R.M. (BNA) 3310 (S.D.N.Y. 1974). That case is readily distinguishable: the court emphasized that the government had easy access to the information demanded from other sources.

272 (citing *Shelton v. Tucker*, 364 U.S. 479 (1960); *Pollard v. Roberts*, 283 F. Supp. 248 (E.D. Ark.), *aff'd per curiam*, 393 U.S. 14 (1968)). Employing the same commonsense approach and relying solely on the nature and scope of the subpoenas at issue, the Second Circuit found that chill would inevitably occur.[6]

This Court has sufficient information before it to conclude that chill is likely to occur; however, should it have any doubt on that point, the Court should remand the case to the New York courts to permit Petitioners to present facts supporting the allegation of chilling effect.

## III. THE CASE IS NOT MOOT BECAUSE THE DISTRICT ATTORNEY CONTINUES TO USE THE MEMBERSHIP LISTS IN HIS ONGOING INVESTIGATION

Respondent's assertion that this case is moot is unfounded.[7] The District Attorney is still holding and using the membership lists in conducting his ongoing investigation, and may well use them in subsequent and unrelated investigations. *See* Petition at 4 n.4. Accordingly, this case presents the Court with a live controversy. Moreover, a ruling by this Court may avoid additional future controversy. If this Court were ultimately to determine that the subpoenas were illegal because they were overly broad, then the names, addresses, telephone and social security numbers acquired from the Petitioners would

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[6] The commonsense approach is the only practical way to determine the likelihood of chill. When information is first demanded and a hearing on a motion to quash is convened, the future psychological impact of compliance with subpoenas cannot be demonstrated empirically. In this case, a year after Petitioners' compliance with the District Attorney's subpoenas, Petitioners are in far better position to marshal evidence to demonstrate chill.

[7] Significantly, Respondent represented to the Appellate Division of the Supreme Court of the State of New York that Respondent would not raise the issue of mootness on appeal if the Petitioners' motion to stay were denied.

have been obtained unlawfully. This determination would affect the use of that data in any ongoing or subsequent criminal or civil proceeding against any of the union members concerned. *See United States v. Friedman*, 532 F.2d 928, 931 (3rd Cir. 1976).

## CONCLUSION

For the reasons set forth above and in the Petition for Certiorari, this Court should review and reverse the decision of the New York Court of Appeals.

Respectfully submitted,

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